

QUEJADA (Migration) [2017] AATA 499 (23 March 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Eligio Pasana Quejada
CASE NUMBER:	1610487
DIBP REFERENCE(S):	BCC2014/3455318
MEMBER:	Hugh Sanderson
DATE:	23 March 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 23 March 2017 at 7:59am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – No evidence of sponsorship provided to Department – Companionship and Commitment to the relationship – Consistent evidence of activities together

1. LEGISLATION

Migration Act 1958, ss 5F, 5F(2)(a)-(d), 65

Migration Regulations 1994, Schedule 2, cl.820.211, cl.820.211(2), cl.820.211(2)(a), cl.820.211(c), r.1.03, r.1.15A, r.1.15A(3)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 5 July 2016 to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 16 December 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the applicant had not provided any evidence that he was sponsored by the sponsoring partner.

BACKGROUND

5. The applicant is a citizen of the Philippines and is currently 58 years old. He was previously married and his wife died in 2013. There are four children of that relationship all of whom who continue to reside in the Philippines.
6. The applicant filed his application on the basis of his marriage to Editha Dela Cruz Paulic. She was born in the Philippines and is currently 54 years old. She was previously married to Pave Paulic who sponsored her for a Partner visa. There are two children of that relationship. She became an Australian citizen on 29 July 1994. She divorced her husband in 2002. She then married Ernesto De Vera who she sponsored for a Partner visa and they had a child together. She divorced her second husband in 2012.
7. Statements were provided which claimed that the parties' family knew each other in the Philippines, although they had never met in person. They began communicating with each other by Facebook in March 2014 when the applicant responded to a post from Ms Paulic. The applicant applied for a Visitor visa and first entered Australia on 7 October 2014. They were married on 17 November 2014. A copy of the marriage certificate has been provided to the Department. There is nothing to indicate that the marriage between the parties is not valid. The current application was filed on 16 December 2014. The applicant was represented in his application by Mr Villanueva.
8. At the time of the application, the applicant did not provide the necessary Sponsorship Form (Form 40 SP). On 26 May 2016 the Department wrote to the applicant, through his agent, requesting further material in support of the application. This included requesting the completed sponsorship form. No further material was provided to the Department.
9. The delegate who considered the application noted that at the time of the application the applicant must be sponsored by the applicant's spouse or de facto partner. As the applicant had not provided a completed sponsorship form the applicant did not meet the criteria in cl.820.211(2) and refused the application. The decision was made on 5 July 2016.
10. On 5 July 2016, after the Department had sent the decision to the applicant's agent, the applicant's agent wrote to the Department by email enclosing a copy of the Sponsorship for a Partner to Migrate to Australia (Form 40 SP). The document was signed by the sponsor on 8 May 2015. Statements were also provided from two friends

of the parties claiming that the relationship was genuine. The agent claimed that he had previously sent these documents to the Department, however, provided no evidence that he had done so. The agent requested the Department reconsider their decision refusing the application.

11. The Department wrote to the applicant's agent on 8 July 2016 noting that there was no evidence of the agent or any other person providing to the Department the Form 40 SP or the other documents the agent had now provided. The Department advised the agent that as a lawful decision had now been made in the Department were unable to revisit the decision.

INFORMATION TO THE TRIBUNAL

12. The applicant provided further documents to the Tribunal including the following:
 - Statement by the applicant's agent explaining his failure to provide the sponsorship form;
 - Details from the parties' joint bank account; and
 - Form 80 Personal Particulars for Assessment signed by the applicant on 8 May 2015.
13. The applicants appeared before the Tribunal on 21 March 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The applicants were represented in relation to the review who attended the hearing.
14. The parties gave consistent information as to various aspects of their life together. Included details of their household, their financial arrangements, their attendance at church and other social activities, their overseas travel both together and individually. They provided details of each other's children and their particular circumstances.
15. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The issue in the present case is whether the applicant is sponsored by the sponsoring partner and whether the parties are in a genuine relationship.

IS THE APPLICANT SPONSORED?

17. Clause 820.211 requires at the time of application, the applicant meets one of several alternative sub criteria. These include 820.211(2)(c) which requires that the applicant was, at the time of application, sponsored by the sponsor, where such person has turned 18; or where they have not, by the sponsor's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in r.1.03 of the Regulations).
18. At the time of decision, the applicant must continue to be sponsored by the sponsor, and the sponsorship must have been approved by the Minister and be still in force. Exceptions apply in certain circumstances where the sponsor has died, or family violence has occurred, or a child is involved.
19. The issue on which the Department refused the application was that the sponsor had not provided the necessary sponsorship form. This was the fault of the applicant's agent

who failed to provide the sponsorship document when the application was initially filed and then failed to respond, due to particular circumstances, when the Department raised with them the fact that the sponsorship documentation had not been provided. That documentation has now been provided to the Department.

20. The Tribunal finds that at the time of the application the applicant was sponsored by Editha Dela Cruz Paulic who is an Australian citizen. At the time of the application the sponsor was aged 52 years old. The Tribunal finds that the sponsor at the time of this decision continues to sponsor the applicant.
21. On the evidence before the Tribunal the requirements of cl.820.211(c) are met and continue to be met at the time of this decision.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

22. The Tribunal has also considered whether the applicant is the spouse of the sponsoring partner. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
23. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

24. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were married on 17 November 2014 in Sydney. A copy of their marriage certificate has been provided to the Department. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

25. The parties live together in a home owned by the sponsor. The sponsor's pay is paid into her sole bank accounts and the applicant's pay is paid into a joint bank account. Most of the expenses for the home are met out of the applicant's bank accounts while the sponsor has access to the joint bank account where the applicant's pay is deposited. Cash is withdrawn from this account to meet day-to-day expenses as well as sending money to the Philippines to assist in the support of the applicant's children. The sponsor was aware of the arrangements for the financial support of the applicant's children in the Philippines.
26. The parties have purchased a property together in the Philippines and are currently repaying that debt together. The parties were aware of each other's financial circumstances and the various liabilities they had together. The parties were also aware

of the arrangements they had made for the repayment of various liabilities and costs of their household.

27. Overall, the Tribunal is satisfied that the parties do pool their financial resources to meet the various expenses the parties incur. They have purchased a property together in their joint names. The Tribunal finds the financial aspects of the relationship are indicative of a genuine and continuing relationship.
28. The parties had been living together in the home owned by the sponsor in which she has lived with her children for a number of years. Her eldest daughter and youngest son live with them in this household. The parties provided consistent information as to the arrangements they have in this household, including who does most of the cooking and cleaning and the contribution that both parties make to the running of the household. The Tribunal finds the parties have established a household together which is indicative of a genuine and continuing relationship. The parties participate together in the support and supervision of the sponsor's youngest child.
29. The main social activity of the parties is to attend the church together. Both parties work long hours with the sponsor working two jobs, the first job from Monday to Friday the second job over the weekend. The applicant also works on weekends with his job when necessary. Although this leaves little time for the parties' social activities they regularly attend church on Sunday evenings as well as going out with friends and relatives. Statements have been provided by friends of the sponsor attesting to the genuineness of the relationship and the fact that the relationship is recognised by them.
30. The parties returned to the Philippines together in September 2016 so that they could visit friends and family together. They provided consistent information as to the activities they participated in over that trip. Photos were provided of the parties together in the Philippines with other family members. The applicant was also able to identify the reason the sponsor returned to the Philippines by herself in May 2016. The parties were able to identify the circumstances of each other's children.
31. The Tribunal finds that the parties do represent themselves as being married to each other and that this relationship is recognised by their friends and family as genuine. This indicates that the parties are living in an exclusive relationship and that the relationship is genuine and continuing.
32. The parties' family know each other as they come from the same area of the Philippines. They commenced a relationship with each other over the Internet soon after the applicant's wife died in March 2014, three years ago. Although they had never met each other in person, their relationship developed to a point where it was agreed they should consider marrying each other. The applicant travelled to Australia on a Visitor visa and soon after his arrival the parties made arrangements to be married. They were married on 17 November 2014, only eight months after having commenced contact with each other over the Internet and only a month after the applicant arrived in Australia.
33. Although the circumstances of the start of the parties relationship and in particular the fact that they had only known each other for a short time raises a concern that the relationship is not genuine, the Tribunal is satisfied that the parties did develop a commitment to each other and a commitment to a long-term relationship. The parties' family had known of each other prior to their establishing contact and therefore they received the support of the family for the relationship. The applicant had recently lost his wife and is not unusual for people in those circumstances to seek another life partner. The sponsor had also suffered two unsuccessful relationships which caused distress and hardship. The fact that the applicant has come to start a life in Australia with the sponsor,

leaving his children in the Philippines, indicates a high degree of commitment to the relationship.

34. The Tribunal has had the advantage of interviewing the applicant and the sponsor together. The parties displayed a high level of companionship and commitment to the relationship. The Tribunal accepts that the parties provide each other the degree of companionship and emotional support which would be expected in a genuine and continuing relationship.
35. The Tribunal has considered all the evidence of the parties both individually and cumulatively. The Tribunal finds that the parties have a mutual commitment to a shared life to the exclusion of all others and that their relationship is genuine and continuing. Since arriving in Australia the parties have been living together in the home of the sponsor and intend to continue to live together in that home.
36. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship.
37. Therefore the applicant meets cl.820.211(2)(a).
38. At the time of the application the applicant held a substantive visa. Accordingly the criteria in cl.820.211(2)(d) is not relevant. Accordingly, the Tribunal finds that the applicant meets the time of application criteria in cl.820.211(2).
39. Are set out above, the Tribunal has found that at the time of the application the applicant was the spouse of the sponsoring partner who is an Australian citizen and that the applicant is sponsored by that person. The Tribunal finds that the applicant continues to meet these criteria at the time of the decision. Accordingly, the Tribunal finds the applicant meets the time of decision criteria in cl.820.221.
40. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

41. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).